

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID A. COMBS)	
Claimant)	
VS.)	
)	
DAN HESS SANDBLASTING)	
Respondent)	Docket No. 1,066,487
AND)	
)	
TRAVELERS PROPERTY CASUALTY COMPANY)	
OF AMERICA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the January 10, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Gary K. Albin of Wichita, Kansas, appeared for claimant. Jeffrey E. King of Salina, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 7, 2014, preliminary hearing and exhibits thereto; the transcript of the December 9, 2013, discovery deposition of claimant; the transcript of the December 18, 2013, deposition of Jackie Haskell; the transcript of the December 18, 2013, deposition of Rick Briney and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The ALJ determined claimant gave timely notice to respondent, stating in the preliminary hearing Order at page two:

Claimant alleges that he notified employees of Respondent in North Dakota, and that those employees were supervisors. Claimant testified that Troy Selensky a.k.a. Troy Schlesinger witnessed the accident and that Claimant notified Cody Oliver of the accident the same day it happened or the next day. These individuals

did appear to exercise some supervisory authority over Claimant and gave directions to him when he was in North Dakota. Claimant would have more direct knowledge of what the actual job conditions were like in North Dakota at the time of the accident than would Mr. Briney in Kansas.

The ALJ concluded claimant sustained personal injury by accident arising out of and in the course of his employment with respondent and the accident was the prevailing factor causing claimant's need for medical treatment.

Respondent contends claimant did not provide timely notice of his accident. Respondent asserts its written safety program required claimant to report his work accident to his immediate supervisor, Rick Briney, but claimant failed to do so. Respondent contends claimant has an obligation to report the date and time of his accident and claimant's allegation of a March 6, 2013, accident is inaccurate. Respondent also argues claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment or that his accident was the prevailing factor causing his injury.

Claimant asks the Board to affirm the preliminary hearing Order.

The issues before the Board are:

1. Did claimant provide timely notice of his accident?
2. Did claimant prove he met with personal injury by accident arising out of and in the course of his employment with respondent? Specifically, was claimant's accident the prevailing factor causing his injury, medical condition and disability?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was a truck driver for respondent. On Monday of each week, claimant would leave Hays, Kansas, driving a truck pulling a flatbed trailer loaded with two oil field tanks to North Dakota. Three of respondent's trucks would generally travel together. The trucks usually arrived in North Dakota on Tuesday evening or Wednesday morning. When claimant arrived in North Dakota, he would call Troy Selensky to find the site where the tanks were to be delivered. Mr. Selensky would always be on the job site where the tanks were delivered. Claimant described Mr. Selensky as the person who "ran the cranes and stuff and told us where to go."¹ Claimant testified Cody Oliver "is the head supervisor over

¹ P.H. Trans. at 15.

the North Dakota bunch.”² Claimant indicated he did not know for certain whether he could be fired by Mr. Oliver, but also indicated Mr. Oliver “could get her done, right.”³

On Wednesday, March 6, 2013, claimant arrived at the job site south of New Town, North Dakota, along with Jeff Rupp and Logan Jones, the drivers of the other two trucks. Claimant had exited his truck, but went back to get more clothing as it was extremely cold. After claimant exited his truck a second time, he began walking across the lot when he slipped on a patch of ice and fell on his left side, including his arm and shoulder. Claimant testified he felt as though he cracked the ribs on his left side and that Mr. Selensky and Mr. Rupp saw the fall.

Claimant continued working, but could not perform all of his duties and was helped by Mr. Selensky and Mr. Jones. The next day, Thursday, claimant was asked by Mr. Oliver to haul treaters. Claimant indicated he told Mr. Oliver he could not haul treaters, as he fell and thought he cracked his ribs. Claimant indicated he was sent back to Hays early by Mr. Oliver. Claimant left for Hays that same day, while the other drivers stayed another day to haul the treaters. Claimant testified he arrived in Hays on Saturday morning, which was later than usual. It took claimant an extra day to get to Hays, because he could not sit and drive for very long. After being shown his driver’s daily log, claimant confirmed he actually arrived in Hays on Friday night.

Claimant acknowledged not telling Rick Briney or anyone else at the Hays facility about the accident and not completing an incident report. Claimant also confirmed respondent’s written safety program indicated work injuries should be reported to his immediate supervisor. Claimant indicated his immediate supervisor was the “immediate person in charge, wherever I’m at.”⁴ Claimant indicated he resigned from respondent on May 16, 2013, because of a combination of several things, including personal reasons.

Claimant testified Mr. Briney would “line our loads up, make sure the trucks were loaded right, the trailers were loaded right and everybody had their loads loaded, give us our paperwork”⁵ When asked who the drivers would call if they had a problem on the way to North Dakota, claimant answered: “Depended on where we was at. If we was midway there somewhere, we’d probably call Rick, but if we was up further north, we’d call -- we’d either call Cody or Troy.”⁶ On cross-examination, claimant agreed Mr. Briney

² *Id.* at 16.

³ *Id.* at 30.

⁴ *Id.* at 29.

⁵ *Id.* at 16.

⁶ *Id.*

was the person who did the hiring and firing for respondent and was in charge of respondent's trucks.

In May 2013, claimant began running a fever, could not eat or sleep and began having severe pain on his left side. On June 23, 2013, claimant sought medical treatment from Dr. T. Scott Webb at Clara Barton Hospital, Hoisington, Kansas. The doctor's notes indicate claimant thought he bruised his ribs and had bruising in his abdomen as the result of a fall on his left side two months earlier in North Dakota. Dr. Webb's notes indicate that a CT of the abdomen and pelvis showed an enlarged cystic dilatation in the mid pole of the left kidney which likely reflected renal contusion with hemorrhage into a previous renal cyst. Dr. Webb's impressions were:

1. Left renal contusion with probable development of a perirenal abscess.
2. Fever and chills with elevated white count, likely related to #1 in the absence of other findings.
3. Possible left-sided retrocardiac pneumonia.⁷

Claimant was hospitalized from June 24 through 28, 2013. Claimant indicated he was referred by Dr. Webb to another physician in Hoisington and that physician wants to do surgery.

Medical records from Clara Barton Hospital revealed claimant sought medical treatment at the emergency room on August 24, 2013, for left lower thoracic and left-sided abdominal pain. Notes from that visit indicated claimant was leaning against a vehicle changing a battery when he felt a pop within his body and felt acute pain. A CT scan of the abdomen and pelvis was unremarkable. It was the impression of Phillip Barnes, PA, that claimant had a contusion of the left thoracic wall.

Jackie Haskell, a human resources assistant for respondent, testified it was respondent's policy that employees should report work injuries to their supervisor, the safety department or human resources.

Mr. Briney testified he was respondent's logistics manager and described his job duties as, "[p]retty much take care of all the trucking and crane operation in North Dakota and loading and unloading down in the yards."⁸ Mr. Briney indicated he had the authority to hire and fire drivers and told them where and when they would take a load and what to do. He testified he was the only person, other than maybe the head of respondent, who supervised the drivers. Mr. Briney indicated he was claimant's immediate supervisor and no one else would be considered claimant's supervisor.

⁷ *Id.*, Cl. Ex. 1.

⁸ Briney Depo. at 4.

Mr. Briney testified that when claimant was hired, he attended a safety orientation. At the orientation, claimant received a typewritten safety program. The section of the safety program concerning reporting injuries states:

All employees will be held accountable for notifying their supervisor of the injury within 24 hours of the occurrence, and filling out an Employee Incident Report, even if medical treatment is not required. Employees must let their supervisor know:

- A. How they think they hurt themselves.
- B. What they were doing at the time.
- C. Who they were working with at the time.
- D. When and where it happened.
- E. Other pertinent information that will aid in the investigation of the incident.

The supervisor will complete the Incident Report Packet and submit [it] to Human Resources. The Incident Report Packet will then be submitted to the Safety Committee for review.

Failure to report an injury immediately (within 24 hours of the injury) is a violation of the Safety Program, and may result in immediate termination, in accordance with company policy.⁹

Mr. Briney provided the following testimony regarding to whom claimant was to report work accidents:

Q. I'm sorry about that. Let me see if I can say it and [it make] sense.

Did you ever tell Mr. Combs, David Combs, that there was [a] particular person that he was supposed to report work comp injuries to and that that was the only person he was supposed to report work comp injuries to?

A. No, all the drivers have been told that.

Q. What were they told?

A. Everything they have, they have any problems, anything happens, they're to report to me.

Q. To you specifically?

A. Yes.¹⁰

⁹ *Id.*, Ex. 1.

¹⁰ Briney Depo. at 38-39.

Mr. Briney indicated claimant was provided with a company phone and was told he could call 24 hours a day. Mr. Briney testified he was never advised by claimant of having a work accident in North Dakota. He testified that Mr. Selensky was not a supervisor of the truck drivers and Mr. Oliver was the lead man in North Dakota. According to Mr. Briney, Mr. Selensky is one of four crane operators who works for respondent in North Dakota and only supervises himself. Mr. Briney testified Mr. Oliver has no supervisory capacity over anyone and is a contact person between North Dakota and Hays. Mr. Briney indicated only he, not Mr. Oliver, had authority to send claimant home early. Mr. Briney averred that if Mr. Oliver had known about claimant's accident, he would have reported it to Mr. Briney immediately.

At Mr. Briney's deposition, claimant's driver's daily logs for March 4 through 8, 2013, were made part of the record. The March 6 driver's daily log indicated claimant hooked, unloaded and dropped trailers in Mandaree, North Dakota. The driver's daily log for March 7 showed claimant worked 15 hours and indicated claimant loaded treaters in Walford City, North Dakota, then later went to Mandaree, North Dakota, and unloaded tanks. The March 8 driver's daily log indicated claimant left North Dakota and drove to Hays.

Mr. Briney testified respondent held a safety meeting on May 6, 2013, concerning reporting accidents and incidents. Mr. Briney indicated claimant attended the meeting, but afterwards said nothing to Mr. Briney or anyone else about an accident.

On May 20 and 21, 2013, claimant did not show up for work. Claimant called Mr. Briney on May 22, 2013. Claimant indicated he was not going to work any longer for respondent and wanted to pick up his paycheck. Claimant gave no reason for quitting.

Mr. Briney, on cross-examination, confirmed he was not in North Dakota during the week of March 6, 2013. He indicated claimant would deliver the tanks to a tank battery site in North Dakota. Mr. Selensky was in charge of taking the material provided by the truck drivers and setting it up in a tank battery, including telling the drivers where to park. Mr. Selensky told the drivers where to unload the material. Mr. Briney testified he told the drivers when to unload the material. Mr. Briney testified if the drivers had a problem, they were to call him. He admitted that at some time or another he asked Mr. Selensky to relay instructions to the drivers.

Three or four days prior to his deposition, Mr. Briney talked with Mr. Oliver and Mr. Selensky and inquired why someone did not inform him of claimant's accident. Mr. Briney testified Mr. Selensky acknowledged he was aware of claimant's accident, but no one told Mr. Briney because claimant said he was okay. According to Mr. Briney, Mr. Oliver indicated he was unaware of claimant's accident and did not recall anything about the incident, including whether he sent claimant home early.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹¹ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹²

Timely notice

K.S.A. 2012 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

¹¹ K.S.A. 2012 Supp. 44-501b(c).

¹² K.S.A. 2012 Supp. 44-508(h).

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Respondent argues its written safety program required claimant to notify his immediate supervisor, Mr. Briney, of the alleged March 6, 2013, accident, but claimant failed to do so. Under respondent's written safety program, employees were to report work accidents to their supervisor, not their immediate supervisor. This Board Member finds claimant was required to give notice of his accident to his supervisor and not specifically to his immediate supervisor, Mr. Briney. The question then becomes: was Mr. Oliver or Mr. Selensky claimant's supervisor at the time of his accident?

In *Brown*,¹³ notice was given by Brown to a lead winder, whom Fabpro did not consider a supervisor, but whom Brown considered to be his supervisor. A Board Member found the lead winder was claimant's supervisor and cited *Phillips*.¹⁴ In *Huff*,¹⁵ notice was given by Huff to her training instructor. The Board determined the training instructor was Huff's supervisor. Mr. Selensky directed claimant's job activities when he arrived on the job site. Claimant's testimony that he reported his accident to Mr. Oliver and was told by him to return to Hays early is credible and demonstrates Mr. Oliver acted as a supervisor. Mr. Selensky and Mr. Oliver did not testify and, therefore, did not dispute claimant's assertions. This Board Member finds Mr. Selensky and Mr. Oliver were claimant's supervisors when he was in North Dakota and both were given timely notice of the accident. Furthermore, Mr. Selensky had actual knowledge of claimant's accident.

Respondent's argument that claimant did not provide notice of the proper date and time of the accident is without merit. Respondent asserts claimant alleged an accident on March 6, 2013, that did not occur. Because claimant's testimony does not exactly match

¹³ *Brown v. Fabpro Oriented Polymers, Inc.*, No. 253,707, 2000 WL 1277552 (Kan. WCAB Aug. 22, 2000).

¹⁴ *Phillips v. Helm's Inc.*, 201 Kan. 69, 439 P.2d 119 (1968).

¹⁵ *Huff v. State of Kansas*, No. 1,032,230, 2013 WL 4779959 (Kan. WCAB Aug. 30, 2013).

the events listed in his daily driver log sheets, respondent argues claimant's testimony is inaccurate. That argument ignores claimant's testimony that Mr. Selensky had actual knowledge of the accident on the day it occurred and that claimant told Mr. Oliver of the accident the next day. Simply put, this Board Member finds claimant satisfied the requirements of K.S.A. 2012 Supp. 44-520(a)(4).

Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent

Respondent contends there is no medical evidence "that clearly provides a causation opinion between the alleged slip and fall in North Dakota and whatever claimant's problems are with his infection or possible contusion to the kidney."¹⁶ Respondent's brief asserts claimant sustained an intervening accident on August 24, 2013, and implied that accident caused his injuries.

Dr. Webb's notes of June 23, 2013, indicated claimant had a left renal contusion with probable development of a perirenal abscess and fever and chills with elevated white count likely related to the abscess. Claimant gave a history of falling on his left side two months earlier in North Dakota and thought he bruised his ribs and abdomen. The medical evidence and claimant's testimony convince this Board Member claimant sustained a kidney contusion on March 6, 2013, that more likely than not developed into a perirenal abscess. There is little, if any, evidence in the record the August 24, 2013, incident with the battery caused claimant's injury. This Board Member affirms the ALJ's finding claimant sustained personal injury by accident on March 6, 2013, arising out of and in the course of his employment with respondent and claimant's accident was the prevailing factor causing his injury and current need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁸

WHEREFORE, the undersigned Board Member affirms the January 10, 2014, preliminary hearing Order entered by ALJ Jones.

IT IS SO ORDERED.

¹⁶ Resp. Brief at 5.

¹⁷ K.S.A. 2013 Supp. 44-534a.

¹⁸ K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of April, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Gary K. Jones, Administrative Law Judge